

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

FILED
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MAR 15 P 2:46

DOUGLAS ALBERT,)
Plaintiff)

U.S. DISTRICT COURT
DISTRICT OF MASS

C.A. No. 05-30008-MAP

MICHAEL THOMAS, et al,)
Defendants)

**DEFENDANTS' MOTION TO VACATE ORDER TO STRIKE DEFENDANTS' EXPERT
WITNESS**

The Defendants, Michael Thomas and the City of Chicopee, move to set aside and vacate the Court Order entered March 10, 2006, granting the Plaintiff's Motion to Strike Defendant's Expert Witness David Standen, and to permit Defendants to file their opposition.

This motion is made on the ground that the Order was entered against the Defendants through Defendants' mistake, inadvertence, surprise or excusable neglect. Failure to file an objection to Plaintiff's motion to strike defendants' expert witness was not intentional but was the result of a excusable neglect and mistake, in that an objection had been prepared and was being reviewed by the parties before filing, (See attached copies of facsimile correspondences between the parties, attached as Exhibit A), and the press of other legal matters for both attorneys resulted in the objection to strike defendant's expert

witness not being filed before March 10, 2006. Defendant has a good and meritorious objection to plaintiff's Motion as shown by defendants proposed Objection to Plaintiff's Motion to Strike Expert Witness, a copy of which is attached and filed with this motion.

Wherefore defendants move the Court for an order setting aside the Order dated March 10, 2006 striking defendant's expert witness and allow the Defendants to file their objections, annexed, to be filed.

RESPECTFULLY SUBMITTED,
THE DEFENDANTS,

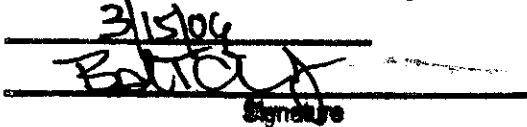
MICHAEL THOMAS
By His Attorney

Date: 3/15/06



Bernard T. O'Connor, Jr.
O'CONNOR, MARTINELLI, CULLINAN
& PIKULA
1391 Main Street, Suite 1022
Springfield, MA 01103
(413) 781-5311
BBO # 557872

I HEREBY CERTIFY THAT A TRUE COPY OF
THE ABOVE DOCUMENT WAS SERVED UPON
(EACH PARTY APPEARING PRO SE AND)
THE ATTORNEY OF RECORD FOR EACH
OTHER PARTY BY MAIL/BY HAND ON

3/15/06

Signature

CITY OF CHICOPEE
By Its Attorney



THOMAS JOHN ROOKE, ESQ.
Associate City Solicitor
Chicopee law department
17 Springfield Street
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(413) 731-9000
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EXHIBIT A

LAW OFFICES
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S. THOMAS MARTINELLI
BERNARD T. O'CONNOR, JR.
EDWARD M. PIKULA
WILLIAM G. CULLINAN
SHAWN M. O'CONNOR

BERNARD T. O'CONNOR (1917-1993)
THOMAS J. O'CONNOR (1925-1996)
WILLIAM L. COHN (1925-2003)

INDIVIDUAL PRACTITIONERS, NOT IN PARTNERSHIP

FAX COVERSHEET

DATE: 3-10-06 PAGES (WITH COVER): 4
TO: Tom Rook FAX: 731-1302

COMPANY: _____

RE: Albert V Chicopee + Thomas

FROM: Ben O'Connor

Dear Tom.
Draft of proposed opposition motion. Please
review for accuracy and any needed changes
thank you - Also Please call to assure me you
rec'd motion. Ben O'Connor

In the event that you have not received a complete transmission, please call us at (413) 781-5311.

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Thank you.

TOTAL P. 01

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Thank you.

* Ben, Motion is Fine,
Tom
2-11-06

Ben

From: ECFnotice@mad.uscourts.gov
Sent: Friday, March 10, 2006 2:20 PM
To: CourtCopy@mad.uscourts.gov
Subject: Activity in Case 3:05-cv-30008-MAP Albert v. Thomas et al "Order on Motion to Strike"

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United States District Court

District of Massachusetts

Notice of Electronic Filing

The following transaction was received from Finn, Mary entered on 3/10/2006 at 2:20 PM EST and filed on 3/10/2006

Case Name: Albert v. Thomas et al

Case Number: 3:05-cv-30008

Filer:

Document Number:

Docket Text:

Judge Michael A Ponsor : ORDER entered granting, without opposition, the Pltf's [27] Motion to Strike Def't's expert witness David Standen; cc/cl. (Finn, Mary)

The following document(s) are associated with this transaction:

3:05-cv-30008 Notice will be electronically mailed to:

Michael J. Akerson mjakerson@yahoo.com

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3:05-cv-30008 Notice will not be electronically mailed to:

3/15/2006

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

DOUGLAS ALBERT,)	
Plaintiff)	
)	
v.)	C.A. No. 05-30008-MAP
)	
MICHAEL THOMAS, et al,)	
Defendants)	

**AFFIDAVIT IN SUPPORT OF DEFENDANTS' MOTION TO VACATE ORDER TO
STRIKE DEFENDANTS' EXPERT WITNESS**

I, Bernard O'Connor, depose and say:

1. I am the attorney for the defendant Michael Thomas in the above-entitled action.

2. On or about February 23, 2006, plaintiff sent me his motion to strike defendants' expert witness. I was out of my office on February 24 and did not see the motion until I returned on February 27, 2006. That week I was called to trial in the matter Commonwealth v. Serrano, Indictment number 05-0308 and that case was tried before a jury in the Superior Court on March 1 and 2, 2006. The majority of my time that week was spent either preparing for trial or trying the case.

3. The week of March 6, 2006 I spent time catching up and on or about March 9, 2006 I prepared an objection to

plaintiff's motion to strike expert witness.

4. On the morning of March 10, 2006 I sent by facsimile transmission a copy of the draft of the motion for co-counsel's perusal and comments. On March 11, 2006 I received correspondence from co-counsel regarding the draft.

5. On March 13, 2006 I received electronic notice that plaintiff's motion to strike had been allowed without opposition.

6. The only reason I did not promptly plead in the case was because of the pressing business of a trial and the consequent losing sight of this case.

7. This motion is not made to delay or prolong this case, but in good faith and for the ends of justice.

Date: 3/15/06


Bernard T. O'Connor, Jr.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

DOUGLAS ALBERT,)	
Plaintiff)	
)	
v.)	C.A. No. 05-30008-MAP
)	
MICHAEL THOMAS, et al,)	
Defendants)	

DEFENDANTS' MOTION TO DENY AND OBJECTION TO PLAINTIFF'S
MOTION TO STRIKE DEFENDANTS' EXPERT WITNESS

The defendants in the above-entitled case object to and move the Court to deny Plaintiff's Motion to Strike Defendants' Expert Witness. As reasons therefore:

1. The defendants state that initial discussions have been held between the defendant parties on retaining an expert but further discussions regarding funds available to retain the expert are continuing. All funding issues in defense of this case must be reviewed by various departments for the City of Chicopee before funds are made available. In addition, by way of brief background, since the beginning of this case and the initial Scheduling Order being issued the City of Chicopee's mayor resigned, the city solicitor resigned, an interim city solicitor was appointed and he has since resigned, and a new mayor was sworn in, adding delay to receiving approval for funding.

2. Although the defendants admit an expert report pursuant to Fed.R.Civ.P Rule 26(a)(2) has not been filed, pending approval

of funding to retain the expert, preliminary negotiations have been made between the defendants and the proposed expert witness, and that information including the expert's name, resume and expected testimony was timely forwarded to counsel for the plaintiff, plaintiff has not averred that any prejudice resulted in defendants' failure to make required disclosure.

3. There was no lack of diligence on the part of the defendants.

4. Plaintiff's motion fails to include a certification that the movant has in good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action. Fed.R.Civ.P. Rule 37(a)(2).

5. Plaintiff's motion to preclude expert testimony and expert evidence should be denied where Defendants' failure to disclose its expert witness list according to Fed. R. Civ. P. 26(a)(2)(C) and the scheduling order, despite disclosing his name and expected testimony, met the harmless exception under Fed. R. Civ. P. 37(c)(1) because, although plaintiff failed to disclose its expert witness report prior to trial and in accordance with the scheduling order, no trial has been set and therefore defendants' error was harmless.

WHEREFORE, the Defendants move that the Court deny Plaintiff's motion to strike defendants' expert witness.

RESPECTFULLY SUBMITTED,
THE DEFENDANTS,

Date: 3/15/06

MICHAEL THOMAS
By His Attorney



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By Its Attorney



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